No. 12028

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

ERNEST H. BRIDGMAN and JAY C. HENSON,

Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLEE'S BRIEF.

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APPELLEE'S BRIEF.

Jurisdiction.

Appellants, together with twenty-five other defendants, were indicted under Title 18, United States Code, Sec. 338 (Mail Fraud). The District Court had jurisdiction under Section 128 of the Judicial Code, as amended, U. S. C. A., Title 28, Chapter 6, Section 225a. The offenses charged were committed in the Southern District of California. Judgments were entered on the 7th day of August, 1948 [T. R. 56, 58]. Notice of appeal was filed on the 25th day of of August, 1948 [T. R. 82] on behalf of appellant Ernest H. Bridgman and on 27th day of August, 1948, on behalf of appellant Jay C. Henson.

The references preceded by the symbols are as follows: "T. R.," Clerk's Transcript; "R.," Reporter's Transcript; "A. B.," Appellant's Brief on Appeal.

Statute Involved.

Title 18, United States Code, Section 338:

"Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, * * * shall, for the purpose of executing such scheme or artifice or attempting so to do, place, or cause to be placed, any letter, postal card, package, writing, circular, pamphlet, or advertisement, whether addressed to any person residing within or outside the United States, in any post office, or station thereof, or street or other letter box of the United States, or authorized depository for mail matter, to be sent or delivered by the post office establishment of the United States, or shall take or receive any such therefrom, whether mailed within or without the United States, or shall knowingly cause to be delivered by mail according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, any such letter, postal card, package, writing, circular, pamphlet, or advertisement, shall be fined not more than $1,000, or imprisoned not more than five years, or both."

Statement of the Case.

An indictment was returned on the 25th day of June, 1947 [T. R. 1] charging appellants and others with violation of Title 18, United States Code, Section 338. The indictment charged the defendants with devising a single scheme, specifying eighteen overt acts, in separate counts, and using the United States mails to defraud [T. R. 1-21]. At the conclusion of the Government's case the Court dismissed all counts of the indictment except Counts 3, 4, 7, 14 and 17 [T. R. 49; R. 3537-38]; and at the close of the case the jury found the defendants Ernest R. Alexander [T. R. 55], Robert M. Johnson [T. R. 59], A. W. Wilson [T. R. 63] and George M. Carner [T. R. 57] not guilty on all five counts. They were unable to arrive at a verdict as to Earl H. Rhodes, Richard L. Sippel, and Ray F. Martin. Appellants Ernest H. Bridgman was found guilty on Count Four [T. R. 56], and Jay C. Henson was found guilty on Count Seven [T. R. 58], and both were each acquitted of four of the remaining counts of the indictment. After denying motions for acquittal and a new trial [T. R. 75], the Trial Judge on the 23rd day of August, 1948 [T. R. 77-78a], sentenced each for a term of thirty months and a fine of $1,000, and both Ernest H. Bridgman and Jay C. Henson are now presenting a joint appeal [T. R. 79-83].

Statement of Facts.

The uncontradicted evidence taken at the time of trial shows that the defendant Earl H. Rhodes was the sole owner of the Los Angeles Manufacturers [R. 4377, Gov. Ex. 41], which manufactured and sold the Star One Cent and Sun Five Cent peanut vending machines. The defendant Rhodes devised the plan and scheme to distribute these vending machines not through vending machine jobbers but so-called "distributors." The appellants Bridgman and Henson were such distributors. Rhodes prepared the advertising literature, profit schedules, brochures [Gov. Exs. 1 and 2], sample newspaper advertisements [Gov. Exs. 29 and 32], letters of identification [Gov. Ex. 3, R. 146, 148], sales kit material [R. 189, 4400, Gov. Exs. 27 to 37, incl.; Defts. Exs. F, G, H, I, L, M, N]. The fraudulent representations devised by Rhodes were: the vending machines were backed by many years of experience; that proven routes were established and the purchaser would have exclusive territories; the vending machines were favorably known to stores everywhere and were in general demand; no experience was required to successfully operate a route of machines; no financial risk involved; each purchaser would be assisted in inaugurating his business; each one cent machine would earn an average net monthly income of from $2.88 to $6.48 and each five cent machine would earn an average net monthly income of from $8.00 to $30.00; the machines were precision built and one hundred per cent foolproof with nothing to get out of order with no gears or wheels requiring adjustment; the machines were a result of many years of experimentation, study and experience; the five cent machine was equipped with a highly perfected and efficient device for ejecting slugs and other

articles besides money [Gov. Exs. 1 and 2]. He exercised control over the distributors, requiring that all new literature be submitted to him for approval [Gov. Ex. 33, R. 4477]. He furnished an outline of the sales talk [Gov. Ex. 27] and instructions to salesmen [Defts. Exs. N and YYY, R. 5444-48]. He further continued to supervise the distribution and sale of the vending machines by dividing the United States into four separate territories with a sales supervisor over each territory [Deft. Ex. P]. He also required the so-called distributor to collect 50% of the purchase price of the sale and requested that the check or money order be made payable to the Los Angeles Manufacturers. The balance of the purchase price was collected by the Los Angeles Manufacturers upon delivery of the machines to the customer, and the so-called distributors' commissions were paid by check of the Los Angeles Manufacturers [R. 111, 112, 115, 116], but not in full until final collection had been made [R. 238].[1]

None of the sales literature prepared by Rhodes was based on actual experience [R. 4478, 4479, 4480]. Neither did the appellants Bridgman or Henson base any of their representations which they made to their prospective customers on any actual experience [R. 5447, 5448, 5451, 5452, 5461, 5477, 6266, 6267, 6282]. They followed the same pattern and technique of selling outlined by Rhodes. They placed ads in newspapers intending to convey the idea that an established vending machine route was for sale [R. 1796, 1797, 1804 to 1809, 1975, 1976, 2240, 2962, 2971, 6233, 6258; Gov. Exs. 10, 11, 25, 74B and C, 113, 129,

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[1]Distributor's Bulletin, Ex. 31, covers the payment of commissions.

162]. This was the bait used to get direct contact with the prospect. Then they made the representations contained in the One and Five Cent folders [Gov. Exs. 1 and 2, 74B and C; R. 6262-65], and the profit schedules [Gov. Exs. 4 and 5, 74A, 79; R. 2248-2251, 2257, 3002, 3004, 3007, 3021, 3026, 3032, 6262-65], knowing them to be false and for the purpose of deceiving and cheating their prospective customers.

Each of the letters set forth in the respective counts in the indictment were admittedly caused to be mailed by the defendants, and each defendant had knowledge of the method of the business and each defendant used the mails in the conduct of the business [Gov. Exs. 10, 11, 25, 74A, 74B, 76, 77, 79A, 79B, 79C, 80, 81, 116, 118, 120, 151; R. 1893, 1900, 1901, 1904, 5455]. They were aware that the mails were being used by persons replying to the newspaper ads as one of the first steps in the scheme and that Rhodes would acknowledge receipt by mail of the order procurred by them [R. 118, 119, 136]. They also knew that in order to complete the transaction a sight bill of lading would be sent through the mails when shipment was made by Los Angeles Manufacturers of the vending machines to the customer [Gov. Ex. 84].

Each of the appellants knew that the representations made by him were untrue and false [R. 6268-70, 81, 82] and with knowledge of this they nevertheless sold and collected from a large number of persons [R. 5454, 6290], including those named in the indictment, a sum of money amounting to many thousands of dollars.

ARGUMENT.

We shall answer the contentions made by the appellants point by point. The appellants have selected a few abstract propositions without pointing out in their brief or even stating reasons in support of these particular contentions. We see no point in discussing them in detail. Suffice it to say that as to each unargued specification of error there is no merit and none of them should be entertained by this Court as a ground for reversal. We will confine ourselves in this argument, therefore, to the issues presented by appellants.

Point I.

The statute permits inconsistent verdicts. 18 U. S. C. 566:

> "On an indictment against several, if the jury cannot agree upon a verdict as to all, they may render a verdict as to those on whom they do agree, on which a judgment shall be entered accordingly, and the cause as to other defendants may be tried by another jury."

It is well established since 1932 that a logical inconsistency is no basis for reversing a conviction; the jury is the sole judge of the facts and will not be disturbed because a co-defendant was acquitted. In an opinion by Justice Holmes, *Dunn v. United States,* 284 U. S. 390 (1932), at pages 393-394, it is said:

> "Consistency in the verdict is not necessary. Each count in an indictment is regarded as if it was a separate indictment. *Latham v. The Queen,* 5 Best & Smith, 635, 642, 643. *Selvester v. United States,* 170 U. S. 262. If separate indictments had been

presented against the defendant for possession and for maintenance of a nuisance, and had been separately tried, the same evidence being offered in support of each, an acquittal on one could not be pleaded as *res judicata* of the other. Where the offenses are separately charged in the counts of a single indictment the same rule must hold. As was said in *Steckler v. United States,* 7 F. (2d) 59, 60:

"'The most that can be said in such cases is that the verdict shows that either in the acquittal or the conviction the jury did not speak their real conclusions, but that does not show that they were not convinced of the defendant's guilt. We interpret the acquittal as no more than their assumption of a power which they had no right to exercise, but to which they were disposed through lenity.' * * *

"That the verdict may have been the result of compromise, or of a mistake on the part of the jury, is possible but verdicts cannot be upset by speculation and inquiry into such matters."

Since the *Dunn* case, the Supreme Court has had the problem before it on other occasions of which the views expressed by Mr. Justice Holmes were reiterated.

Borum v. United States, 284 U. S. 596;

United States v. Dotterweich, 320 U. S. 277, 279.

Other cases in point are:

American Medical Ass'n v. U. S., 130 F. 2d 233, 252 Aff'd 317 U. S. 519;

Suetter v. United States, 140 F. 2d 103 (C. C. A. 9);

Muench, et al. v. United States, 96 F. 2d 332, 336 (C. C. A. 8);

Macklin v. United States, 79 F. 2d 756 (C. C. A. 9);

Sasser v. United States, 29 F. 2d 76 (C. C. A. 5), cert. den. 279 U. S. 836.

The case of *Macklin v. United States,* 79 F. 2d 756, 758 (C. C. A. 9), has followed the ruling in the *Dunn* case, and where it is said:

> "The verdicts are not inconsistent, but had they been so, that fact, standing alone, would not render the verdict of guilty under the first count invalid. This court said, in Bilboa *et al.,* v. U. S., 287 F. 125, 127: 'It was the duty of the jury to return a verdict upon each count of the indictment, and the fact that it found the defendants not guilty on one count does not render conviction in the other invalid.' And the Second Circuit has said, in Seiden v. U. S. (C. C. A), 16 F. (2d) 197, 198: 'We have held that, when a jury convicts upon one count and acquits upon another the conviction will stand, though there is no rational way to reconcile the two conflicting conclusions.'"

The appellants have cited the case of *Speiller v. United States,* 31 F. 2d 682 (C. C. A. 3), which is no longer the law and is commented upon in *Pilgreen v. United States,* 157 F. 2d 427, 428 (C. C. A. 8), as follows:

> "Appellant relies upon cases decided prior to 1932, such as Speiller v. U. S., 3 Cir., 31 F. 2d 682, and Boyle v. U. S., 8 Cir., 22 F. 2d 547. The teaching of the cases relied upon by appellant is not now the law in the federal courts. Consistency in the verdict of a jury is not necessary. Where different offenses are separately charged in the counts of a single indict-

ment and the same evidence is offered in support of each, an acquittal on one count can not be pleaded as *res judicata* of the others. Dunn v. U. S., 1932, 284 U. S. 390, 52 S. Ct. 189, 76 L. Ed. 356, 80 A. L. R. 161; U. S. v. Dotterweich, 320 U. S. 277, 279, 64 S. Ct. 134, 88 L. Ed. 48; Foshay v. United States, 8 Cir., 68 F. 2d 205; Audett v. United States, 8 Cir., 132 F. 2d 528; Stein v. United States, 9 Cir., 153 F. 2d 737, 744; United States v. Hare, 7 Cir., 153 F. 2d 816, 819."

In the case of *Downing v. United States,* 157 F. 2d 738 (C. C. A. 8), further comment is made upon the decisions of the courts prior to the *Dunn* case, and says at page 739:

"Prior to Dunn v. United States, 284 U. S. 390, 52 S. Ct. 189, 76 L. Ed. 356, 80 A. L. R. 161, there had been a conflict in the federal courts on whether an inconsistent verdict on the separate counts of an indictment could support a criminal sentence. The Dunn case settled the question, however, when the Supreme Court refused to reverse a conviction for inconsistency in verdict on the separate counts of an indictment, involving the same evidence, and said, 284 U. S. at page 393, 52 S. Ct. at page 190: 'Consistency in the verdict is not necessary. Each count in an indictment is regarded as if it was a separate indictment. * * * If separate indictments had been presented against the defendant for possession [of intoxicating liquor] and for maintenance of a nuisance, and had been separately tried, the same evidence being offered in support of each, an acquittal on one could not be pleaded as *res judicata* of the other. Where the offenses are separately charged in the counts of a single indictment the same rule must hold.' "

The cases relied upon by appellants are not applicable for none of them involve the same factual situation as the instant case. They are cases involving a factual situation in which the same offense is charged in two or more counts or several separate conspiracies were consolidated. Contrasting the facts of the case on appeal with the circumstances cited in appellants' brief, it is readily seen that none of the cases cited are in point.

In *Mitchell v. United States,* 142 F. 2d 480 (C. C. A. 10), the court held that where there was a continuing scheme, but separate uses of the mails, a conviction on each separate use of the mails would support separate sentences under the law.

The facts of *Sasser v. United States,* 29 F. 2d 76 (C. C. A. 5), are analogous to those in this appeal. The defendants were charged in twenty counts with violation of the same statute as the appellants, to-wit: mail fraud, 18 U. S. C. A. 338. The defendant Sasser was convicted on Counts 1 and 5, defendant Baker on Counts 5 and 7, defendant Adams on Counts 1 and 20, and defendant Russell on Counts 8 and 16. The court commented at page 78 as follows:

> "As already stated the existence of the scheme was not seriously in dispute and there was abundant evidence to show the guilty connection of each defendant with it. Adams signed the letter set out in the first count. It was not shown that Russell signed any of the letters, but if he was a party to the scheme, it was immaterial that the letters were signed and mailed by the other defendants. Partnership in crime

being established against all of the defendants, the act of any defendant in furtherance of the common criminal plan was the act of all. Davis v. U. S. (C. C. A.), 12 F. 2d 253."

In the case of *Hare v. United States,* 153 F. 2d 816 (C. C. A. 7), cert. den. 328 U. S. 836, the court said the inquiry is over the sufficiency of the evidence to support the verdict of guilt as to the co-defendant and that the court looks to evidence to determine the guilt of an accused person, not to the verdict as to the guilt of another.

See also:

Chiaravalloti v. United States, 60 F. 2d 192 (C. C. A. 7).

Point II.

Appellants contend that a mass trial is unconstitutional and a prejudicial misjoinder which requires reversal of judgment, and admit that no direct authority has been found establishing a rule that it is unconstitutional or reversal error to conduct a trial for 59 days (A. B. p. 15). They rest their argument upon the premises that the defendants are entitled to a speedy trial. Under the Sixth Amendment to the Constitution the provision relating to a speedy trial was intended to prevent the oppression of citizens by holding criminal prosecutions suspended over them for an indefinite time, and to prevent delays in the administration of justice by imposing upon judicial tribunals an obligation to proceed with reasonable dispatch in the trial of criminal accusations. So far as the conduct of a trial is concerned, all that is required is that it be conducted according to fixed rules, regulations and pro-

ceedings of law, free from vexations, capricious and oppressive delays.

See, *e. g.:*

Daniels, et al. v. United States, 17 F. 2d 339 (C. C. A. 9), cert. den. 274 U. S. 744;

Shepherd v. United States, 163 F. 2d 974 (C. C. A. 8);

United States v. Holmes, 168 F. 2d 888 (C. C. A. 3).

All matters touching the proper, orderly and speedy trial, conduct of a trial, rests in the sound discretion of the trial court.

Adler v. United States, 182 Fed. 464, 472 (C. C. A. 5).

The appellants have failed to show any prejudice.

See, *e. g.:*

Collins, et al. v. United States, 157 F. 2d 409, cert. den. 315 U. S. 860 (C. C. A. 9).

We find nothing in the record to indicate that the sound discretion exercised by the Trial Judge in attempting to expedite the trial and prevent delays was abused and abuse of discretion will never be presumed.

The *Kotteakos* case, 328 U. S. 750, relied upon by the appellants, does not support their contention that appellants were denied a fair trial because several defendants charged under the mail fraud statute were tried jointly but on the contrary states at page 773:

"There are times when of necessity, because of the nature and scope of the particular federation, large

numbers of persons taking part must be tried together or perhaps not at all, at any rate as respects some. When many conspire, they invite mass trial by their conduct."

The decision in *Kotteakos v. United States* must be distinguished from the later case of *Blumenthal v. United States,* 322 U. S. 539, both decisions having been written by Justice Rutledge. In the *Kotteakos* case the Government, at page 752, admitted they had not proved one conspiracy but eight or more different ones of the same sort executed through a common key figure. The fraudulent applications for loans were made for different and independent people connected by the circumstances that the various loans were arranged by the same individual, and the court pointed out in the *Blumenthal* case at page 558 that it was very different from the facts admitted to exist in the *Kotteakos* case:

"Apart from the much larger number of agreements there involved no two of those agreements were tied together as stages in the formation of a larger all inclusive combination all directed to achieving a single unlawful end or result.

"On the contrary, each separate agreement had its own distinct illegal end. Each loan was an end in itself, separate from all others although all were alike in having similar illegal objects * * * (p. 559). Here the contrary is true. All knew of and joined in the overriding scheme. All intended to aid the owner of the Francisco or another to sell the whiskey unlawfully, though the two groups of defendants differed on the proof in knowledge and belief concerning the owner's identity. All by reason of their knowledge of the plan's general scope, if not its exact

> limits, saw a common end to aid in disposing of the whiskey. True, each salesman aided in selling only his part but he knew the lot to be sold was larger and thus he was aiding in a larger plan. We think therefore that in every practical sense the unique facts of this case reveal a single conspiracy in which the several agreements were essential and integral steps, * * *"

The facts in the case before the Court are analogous to those in the *Blumenthal* case. Each of the appellants knew that when he joined the scheme the part he was playing in carrying out the plan was devised by Rhodes. Both intended by selling vending machines to aid and assist Rhodes in carrying out his scheme. It is not essential that each member of the scheme know and come in direct contact with all the other members in relation to the scheme. Neither is it required that each participate in or have knowledge of all operations of the scheme. It suffices if a conspiracy is formed and several persons knowingly contribute their efforts. The essence of the crime charged in the substantive counts on which appellants were found guilty is the scheme to defraud and the use of the mails in furtherance of it. In *Pietch,* 110 F. 2d 817, 821, cert. den. 310 U. S. 648, it is said:

> "Whether such scheme was formed may be established by facts and circumstances and the reasonable inferences and deductions which fairly may be drawn from them. * * * It is not essential to constitute the offense that the agreement be in any specified form or that any particular words be used. It is enough if the minds of the parties meet and unit in an understanding way to accomplish the common purpose."

Also:

Berenbeim v. United States, 164 F. 2d 679, 683, 684 (C. C. A. 10), cert. den. 333 U. S. 827;

Kaufman v. United States, 163 F. 2d 404, 411 (C. C. A. 6), cert. den. 333 U. S. 857;

Baker v. United States, 156 F. 2d 386, 391 (C. C. A. 5), cert. den. 329 U. S. 763;

United States v. Manton, 107 F. 2d 834, 848 (C. C. A. 2), cert. den. 309 U. S. 604;

Booth v. United States, 57 F. 2d 192 (C. C. A. 10).

Point III.

The Court properly granted the Government's motion admitting all the evidence against all defendants with the exception of portions of the testimony of the witness Van Meter [T. R. 48]. The procedure followed by the Trial Court below admitting the testimony of each witness against only a particular defendant with whom he dealt, and awaiting the motion of the Government at the close of its case to admit all of the testimony against all of the defendants upon the ground that a scheme had been then established among all of them, was approved in the *Blumenthal* case, 332 U. S. 539. It is the appellant's contention that since this evidence as admitted was limited to one or the other of the defendants that they were deprived of the right of cross-examination. They argue that they could not fully cross-examine the Government witnesses at the time of the original limited admission of the testimony. The record in this case does not support this

contention; they were given full opportunity to cross-examine each Government witness. At the time of the granting of the Government's motion to admit all evidence against all defendants, there was ample proof of the existing scheme. The evidence sufficiently showed a concert and privity among the defendants. In a scheme to defraud under the mail fraud statute it is not necessary to show any formal agreement, for the agreement may be shown "if there be concert of action, all of the parties working together understandingly with a single design for the accomplishment of a common purpose."

United States v. O'Connell, 165 F. 2d 697, 699 (C. C. A. 2, 1948); cert. den. 333 U. S. 864.

In the case of *Robertson v. United States,* 33 F. 2d 238 (C. C. A. 9), the Court says at page 240:

> "Furthermore, a scheme to defraud when shared in by several, becomes a conspiracy, and if a conspiracy exists in fact, the rules of evidence are the same as where a conspiracy is charged."

The acts of one of several participants in a mail fraud scheme in furtherance of a common criminal enterprise are in law the acts of all.

Thus in *Bogy v. United States,* 96 F. 2d 734 (C. C. A. 6), at page 741, the Court said:

> "It need hardly be repeated that all who with criminal intent join themselves even slightly to the principal scheme, are subject to the statute, although they were not parties to the scheme at its inception

(Kaplan v. U. S., 2 Cir., 18 F. 2d 939), the acts of one in furtherance of a common criminal enterprise being in law the acts of all. Sasser v. United States, 5 Cir., 29 F. 2d 76; Belt v. United States, 5 Cir., 73 F. 2d 888."

As was said in *American Tobacco Co. v. United States* (C. C. A. 6), 147 F. 2d 93, 107, aff'd 328 U. S. 781:

> "It is the common design which is the essence of the conspiracy or combination; and this may be made to appear when the parties steadily pursue the same object, whether acting separately or together, by common or different means, but always leading to the same unlawful result. U. S. v. Harrison, 3 Cir., 121 F. 2d 930; Allen v. U. S., 7 Cir., 4 F. 2d 688. Often, if not generally, direct proof of a criminal conspiracy is not available, and the common purpose and plan are disclosed only by a development and collocation of circumstances."

and further * * *

> "Where the circumstances are such as to warrant the jury in finding that the conspirators had some unity of purpose, or some common design and undertaking, or some meeting of minds in an unlawful arrangement, the conclusion that a conspiracy is established, is justified. See Marx v. U. S., 8 Cir., 86 F. 2d 245, 250; Shannabarger v. U. S., 8 Cir., 99 F. 2d 957."

Point IV.

The appellants assert that the evidence is wholly insufficient as to the counts of the indictment of which they were convicted. It is well settled that the sufficiency of evidence is generally a jury question. Fairly recent cases on this proposition are:

Hemphill v. United States, 120 F. 2d 115 (C. C. A. 9), cert. den. 314 U. S. 627;

Yoffe v. United States, 153 F. 2d 570 (C. C. A. 1).

It is also established that appellate courts will consider the evidence most favorable to the prosecution and will indulge in all reasonable presumptions in support of trial courts' rulings and draw all inferences permissible from the record whether evidence is sufficient to sustain a conviction.

Henderson v. United States, 143 F. 2d 681 (C. C. A. 9).

There are two elements of the offense: (a) the devising of some scheme or artifice to defraud; and (b) the use of the mails in the execution, or attempted execution thereof, such misuse of the mails being the gist of the offense. The crime is complete when the scheme to defraud is devised and the mails are used to execute it.

Busch v. United States, 52 F. 2d 79 (C. C. A. 8);

Belt v. United States, 73 F. 2d 888 (C. C. A. 5);

Alexander v. United States, 95 F. 2d 873 (C. C. A. 8);

Van Riper v. United States, 13 F. 2d 961 (C. C. A. 2);

Levine v. United States, 79 F. 2d 364 (C. C. A. 9).

and numerous others are authority for the proposition that all who with guilty knowledge join a combination formed for a criminal purpose within the purview of the statute subject themselves to the penalty provided, regardless of their participation or lack of understanding of the scope or membership of the unlawful combination. It is enough that the members agree to execute the criminal purpose and, of course, under the well established rule, the act of one becomes the act of all.

In *Pinkerton v. United States,* 328 U. S. 640, at pages 646, 647, quoting from *Hyde v. United States,* 225 U. S. 347, 369, it is said:

> "And so long as the partnership in crime continues, the partners act for each other in carrying it forward. It is settled that an overt act of one partner may be the overt act of all without any new agreement specifically directed to that act." *United States v. Kissel,* 218 U. S. 601, 608.

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> "Motive or intent may be proved by acts or declarations of some of the conspirators in furtherance of the common objective. *Wiborg v. U. S.,* 163 U. S. 632, 657, 658. A scheme to use the mails to defraud, which is joined in by more than one person is a conspiracy. *Cochran v. United States,* 41 F. 2d 193, 199, 200. Yet all members are responsible though only one did the mailing. *Cochran v. United States, supra; Mackett v. United States,* 90 F. 2d 462, 464; *Baker v. United States,* 115 F. 2d 533, 540; *Blue v. United States,* 138 F. 2d 351, 359."

In *Nye-Nissen v. United States,* 168 F. 2d 846, 852, the Court said:

> "The existence of a conspiracy may be inferred from acts of persons which are done in pursuance of an apparent criminal purpose. Blumenthal v. U. S. (9 C. C. A.), 158 F. 2d 883, Aff'd 332 U. S. 539. Once the existence of a conspiracy is clearly established, slight evidence may be sufficient to connect a defendant with it. Myers v. U. S. (6 C. C. A.), 94 F. 2d 443, cert. den. 304 U. S. 583; Phelps v. U. S. (8 C. C. A.), 160 F. 2d 858."

The appellant Henson contends that because he made a full disclosure to a postal inspector and was told that he could not see anything wrong, it is a complete defense. He further contends that he acted in good faith and had no complaints about the glass in the vending machine sold by him. The courts have said that good faith and honest belief of the truth of the representations made is a complete defense provided the representations do not go beyond such an honest belief and that the honest belief is in actual existence. Where the scheme is based upon false and fraudulent representations, pretenses, and promises made to deceive and defraud, it is not a defense that the perpetrator believed he could make a success of the enterprise or protect the investor against the loss. In other words, he cannot make a wrongful matter right by pointing to the ultimate good intentions.

Foshay v. United States, 68 F. 2d 205 (C. C. A. 8);

Hyney v. United States, 44 F. 2d 134 (C. C. A. 6).

The substance of the testimony of every witness shows that the appellants were following the general course of conduct outlined by Rhodes by making the same representations and using the identical technique by the placing of a false ad in the newspaper, and they continued the fraud by furnishing the prospects with copies of the brochures [Gov. Exs. 1 and 2] and the false profit schedules [Gov. Exs. 4, 5]. They continued the fraud and misrepresentations by leading the purchasers to believe that they would assist them to establish routes.

They also urge it was error to admit evidence of the dealings and transactions of the other co-defendants because they were operating under a distributor's agreement. These distributors' agreements were mere legal fiction[2] and part and parcel of the over-all scheme to afford Rhodes a certain amount of protection from the misrepresentations which he knew the so-called distributors would make.

The undisputed proof establishes a plan or scheme on the part of the appellants and the use of the mails in the furtherance thereof and that the scheme or plan was put into force and effect with full knowledge on the part of the appellants.

The evidence definitely establishes the appellant Henson's lack of good faith or honest belief in dealing with the particular persons named in the indictment. The record shows that the same letter was sent through the mails, the same financial chart and the same plan as set forth in the indictment. It is well established that the

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[2]Exhibit 75. Business card of Henson states manufacturer's agent.

mailing of the count letter need not have been personally performed by the defendant. The following cases present varying examples of evidence deemed sufficient to meet the requirements of the statute:

Barnard v. United States, 16 F. 2d 451, 453 (C. C. A. 9);

Lonergan v. United States, 95 F. 2d 642, 643 (C. C. A. 9);

Wells v. United States, 9 F. 2d 335 (C. C. A. 9).

Appellate courts are precluded from passing on the weight of the evidence; their duty is to determine whether the jury had the right to pass on what evidence there was.

In *Craig v. United States,* 81 F. 2d 816 (C. C. A. 9), this Court, speaking through Judge Garrecht, stated at page 827:

> "Here again we believe that the appellants, despite their correct statement of the rule elsewhere in their brief, have overlooked the true function of this court. To sustain a conviction, we would not be concerned *beyond reasonable doubt* that the defendant is guilty: it is sufficient if there is in the record substantial evidence to sustain the verdict."

In the face of these decisions we submit that the evidence is sufficient to establish that there was a scheme or artifice to defraud and that in the execution of the scheme the mails were used in the furtherance thereof.

Point V.

The appellants contend that the court refused to instruct the jury to the effect that counsel for appellants had a right to cross-examine a witness called by the co-defendant Rhodes. Reporter's Transcript 3907, cited by appellant Bridgman, does not support this contention. Full cross-examination of all the witnesses was allowed. Under Rule 30, Federal Rules of Criminal Procedure, it is provided:

> "No party may assign as error any portion of the charge or omission therefrom unless he objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which he objects and the grounds of his objection."

In *Fredrick v. United States,* 163 F. 2d 536, this court has said at page 549:

> "It has long been the settled rule in Federal Courts that an instruction by the court must be excepted to before the case is submitted to the jury in order to be availed of on appeal. This is no merely technical requirement, but is founded upon reason, justice and expediency. If the error is seasonably called to the court's attention, the court can correct it forthwith and thus obviate the necessity of a new trial."

The appellate courts do not consider alleged error in instructions unless substantial prejudice has resulted. See *e. g., Monroe v. United States,* 164 F. 2d 471, 474. Neither appellants requested instructions on this point [R.

6495]. The Court's instructions on the law are set forth in the Transcript of Record[3] at pages 12-39, and the issues of the propriety and comprehensiveness were submitted without objection [R. 6-8, 50] except as specified [R. 40-50]. Without discussing the Trial Court's instruction in detail, we respectfully submit they amply protected appellants and there was no prejudicial error requiring reversal of the judgment below.

Point VI.

It is appellant Bridgman's contention that he had a right to cross-examine the witnesses called by the co-defendant Rhodes. The record in this case does not support this contention. The appellants were not denied the right of full cross-examination of any witness. The scope, limitation and extent of cross-examination of witnesses in a criminal case rests in the sound discretion of the trial court. (*Madden v. United States,* 20 F. 2d 289, 292 (C. C. A. 9).) It is only in case of a clear abuse of such discretion, resulting in the manifest prejudice to the complaining party that a reviewing court will interfere.

See, *e. g.:*

Brady v. United States, 26 F. 2d 400, cert. den. 278 U. S. 621 (C. C. A. 9);

Glasser v. United States, 315 U. S. 60, 83.

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[3]These references are in the Supplemental Transcript dated August 4, 1948.

In determining whether there was any prejudice suffered by defendant which might affect its substantial rights to justify a reversal of judgment, it is necessary to look at the transaction in connection with the entire record. If from the record the admission of evidence concerning these transactions are not prejudicial, the Appellate Court will not reverse the judgment.

Lewis v. United States, 38 F. 2d 406, 410 (C. C. A. 9):

> "Reversal will not result from error, unless from the whole record it appears to be prejudicial."

The Record before this Court discloses that appellants fully cross-examined the Government witnesses, and their contention in this respect is clearly without merit.

Conclusion.

A study of the record reveals that from the inception of the trial until and including the verdict of the jury appellants were afforded a fair and impartial trial.

In final analysis, the issues involved here are simple and concern only two essential elements:

1. The existence of a scheme to defraud.
2. The placing or causing to be placed in the post office of a letter, postcard, or other mailable matter, for the purpose of executing, or attempting to execute, the scheme.

The jury had only to weigh the evidence admitted and determine the real issues, to-wit: Was a scheme and arti-

fice formulated to defraud? Did appellants Bridgman and Henson adopt and become parties to said scheme and artifice? Were the United States mails used to execute said scheme and artifice to defraud?

The jury being the sole judges of the fact, found the defendants guilty. Appellee submits that appellants were given a fair trial, free from error, each were clearly guilty of the offense charged, and the verdicts are fully supported by the evidence.

Respectfully submitted,

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